83-1154

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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

MOUNT AIRY LODGE, INC.,
Petitioner

v.

THE UPJOHN COMPANY,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN A. COZEN,
PATRICK J. O'CONNOR,
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and

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit, in holding that the jury's answers to the special verdict interrogatories were consistent, has rendered a decision in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit that an award of damages to the plaintiff and against the defendant is irreconcilably inconsistent with a separate finding by the jury that the defendant is not liable to the plaintiff.

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I. QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Third Circuit, in holding that the jury's answers to the special verdict interrogatories were consistent, has rendered a decision in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit that an award of damages to the plaintiff and against the defendant is irreconcilably inconsistent with a separate finding by the jury that the defendant is not liable to the plaintiff.

II. STATEMENT OF JURISDICTIONAL GROUNDS

The United States District Court for the Eastern District of Pennsylvania entered judgment for defendant-respondent. The

Upjohn Company ("Upjohn")[1/], and against plaintiff-petitioner, Mt. Airy Lodge, Inc., ("Mt. Airy")[2/] on November 19, 1982.[3/]. By Order dated December 1, 1982, the District Court denied Mt. Airy's Motion to Vacate Judgment or for Judgment Notwithstanding the Verdict.[4/]

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court by Order dated September 22, 1983.[5/] The Third Circuit Court of

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1/ Upjohn is not a parent, subsidiary or affiliate of another corporation.

2/ Mt. Airy is not a parent, subsidiary or affiliate of another corporation.

3/ Appendix at A-4. No opinion was delivered by the District Court upon the rendering of judgment.

4/ Appendix at A-5. No opinion was delivered by the District Court upon denying Mt. Airy's post-trial motions.

5/ Appendix at A-1. No opinion was delivered by the Court of Appeals upon affirming the judgment of the District Court.

Appeals denied Mt. Airy's Petition for Rehearing by Order dated October 17, 1983.[6/]

This Court has jurisdiction to review by Writ of Certiorari the decision of the Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. §1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States of America, Amendment Seven, provides as follows:

> "In Suits at Common law, where the value in controversy shall exceed Twenty Dollars ($20.00), the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

6/ Appendix at A-2. No opinion was delivered by the Court of Appeals upon denying Mt. Airy's Petition for Rehearing.

IV. STATEMENT OF THE CASE

The petitioner, Mt. Airy Lodge, Inc. ("Mt. Airy") filed its action against the respondent, The Upjohn Company ("Upjohn") in the District Court for the Eastern District of Pennsylvania, pursuant to the District Court's jurisdiction under 28 U.S.C. §1332 by virtue of the diversity of citizenship of the parties. In its Complaint, Mt. Airy sought damages for the destruction of its laundry building as a result of a fire which occurred on January 25, 1978. The fire spread rapidly and intensely by virtue of Upjohn's polyurethane foam insulation which had been sprayed onto the interior walls of Mt. Airy's laundry building. The flammability characteristics of polyurethane foam required it to be covered with an approved thermal barrier, such as gypsum wallboard or cement. Because Mt. Airy had not been

informed by Upjohn of the need for such a protective covering over Upjohn's polyurethane foam insulation, it was left in an exposed condition within Mt. Airy's laundry building.

Mt. Airy's action, as set forth in its Complaint, was based upon four theories of liability: negligence, strict liability, misrepresentation, and breach of warranty. Mt. Airy's Complaint sought both compensatory and punitive damages. Mt. Airy's pecuniary losses consisted of property damage to its laundry building and contents, and retrofit expenses which would be incurred in order to rectify the structural damage to certain of Mt. Airy's other buildings which also contained exposed applications of foam.

By Order dated July 15, 1982, the District Court dismissed certain counts of Mt. Airy's Complaint, including its claims

for negligent testing, inadequate warnings, breach of warranty, design defect and retrofit expenses, permitting the balance of Mt. Airy's asserted theories of liability (negligence, strict products liability and misrepresentation) and damages to proceed to trial. (Appendix at A-6).

This matter proceeded to trial before the United States District Court for the Eastern District of Pennsylvania on October 5, 1982. The trial was concluded on October 27, 1982. The District Court delivered its instructions to the jury on October 28, 1982. In the course of delivering its instructions to the jury, the District Court instructed the jury that, in answering the special verdict interrogatories pertaining to damages, the jury should "...come to the issue of damages if, but only if, your finding on liability is that Upjohn is liable to Mt. Airy Lodge on one of the three theo-

ries that I have outlined." (N.T. at 3125, Appendix to Appeal from the District Court, (hereinafter called "Appendix to D.Ct.App.") at 3499a; See, N.T. at 3126-3137, Appendix to D.Ct.App. at 3500a-3511a).[7/]

On October 29, 1982, this matter was submitted to the jury for decision in the form of 13 special verdict interrogatories, pursuant to F.R.C.P. No. 49(a). (Appendix at A-10). Interrogatories 1 through 11, inclusive, inquired, as to each of the three theories of liability, whether Upjohn was culpable and, if so, whether its culpability was a substantial factor in contributing to the spread of the fire. Interrogatories 12 and 13 dealt, respectively, with compensatory and punitive damages. Because the par-

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7/ The Appendix to Mt. Airy's Appeal from the District Court for the Eastern District of Pennsylvania is on file with the Clerk of the United States Court of Appeals for the Third Circuit.

ties had agreed that Mt. Airy's actual compensatory damages were $973,000.00, this amount was pre-printed in response to interrogatory 12 on the special verdict interrogatories submitted to the jury.

The District Court distributed the special verdict interrogatories to the jury, together with a covering memorandum, which reiterated the Court's oral instructions that the jury was not to answer the damages interrogatories unless it first found Upjohn liable on at least one of the three theories of liability. (Appendix at A-8).

On October 29, 1982, at 2:35 p.m., the jury returned with answers to the special verdict interrogatories which were announced, in part, by the jury foreman in open court. (N.T. for Verdict at 1-5, Appendix to D.Ct. App. at 797a-801a). The actual interrogatories which had been answered by the jury

remained in the physical possession of the foreman as the jury's answers to the interrogatories were reported. Accordingly, after the foreman reported that the jury had answered "no" to interrogatories 2, 7 and 10, the District Court inferred, and all counsel assumed, that the jury had not proceeded to answer the damages interrogatories.

Shortly following dismissal of the jury, a conference was convened in the District Court's chambers on October 29, 1982, to discuss certain statements made by two individual jurors to Mt. Airy's counsel after conclusion of trial. These statements by the jurors disclosed that every member of the jury had intended to find in favor of Mt. Airy and against Upjohn, and that the jury believed it had awarded Mt. Airy the sum of $973,000.00. At this conference, and for the first time, counsel were shown

the actual answers of the jury to the special verdict interrogatories which, in contradiction to what had been reported in open court, reflected the jurors' negative answer to interrogatory 13, addressing the issue of punitive damages. This was the first time that counsel had been informed, or had reason to know, that the jury had, in fact, proceeded to answer interrogatory 13 in addition to answering interrogatories 1, 2, 6, 7, 9 and 10 as reported by the jury foreman. (N.T. for Conference before the Honorable Louis H. Pollak on October 29, 1982, at 1-23, Appendix to D.Ct.App. at 802a-824a).

The District Court was deeply disturbed by these newly discovered circumstances and, by Memorandum Opinion dated November 15, 1982, the District Court concluded that he was authorized and required to recall certain of the jurors in order to interro-

gate them, individually and in camera, about their answers to the special verdict interrogatories.[8/]

On November 19, 1982, the District Court conducted its post-trial interrogation of jurors nos. 3 and 4 and the jury foreman, after which the District Court reported the results of its interviews to counsel. The collective intent of the jury to award Mt. Airy the stipulated compensatory damages was independently verified by each of the interviewed jurors. Because this amount had been inserted in response to interrogatory 12 before submission of the special verdict interrogatories to the jury, the jury was prevented from manifesting its award of damages to Mt. Airy by writing the

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8/ The Opinion of the District Court, holding that grounds existed for a post-verdict interview of certain jurors, is officially reported at 96 F.R.D. 378 (E.D. Pa. 1982), and may be found in the Appendix at A-16.

amount of money being given. Nevertheless, the interviewed jurors confirmed that every single juror understood and intended the jury's collective answers to the interrogatories to include an award of damages to Mt. Airy. (N.T. for Post-Trial Interview of Jurors on November 19, 1982 at 1-56A, Appendix to D.Ct.App. at 883a-938a).

This intent on the jury's part was objectively manifested by the jury's consideration of interrogatory 13, notwithstanding the District Court's instructions that "...you will only go on to the damage interrogatories, which are 12 and 13, if you find liability on one of the three theories of liability." (N.T. at 3131, Appendix to D.Ct.App. at 3505a).

Despite the clear inconsistency between the jury's negative answers to the causation interrogatories and the jury's award of compensatory damages, the District

Court entered judgment against Mt. Airy, and in favor of Upjohn, on November 19, 1982. (Appendix at A-4).

V. REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S JUDGMENT FOR UPJOHN ON THE BASIS OF IRRECONCILABLY INCONSISTENT ANSWERS BY THE JURY TO SPECIAL VERDICT INTERROGATORIES, THEREBY RENDERING A DECISION IN CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

It is well settled that a verdict may not be based upon inconsistent answers to special verdict interrogatories, unaccompanied by a general verdict form, and that under such circumstances, a new trial is mandatory. Slaughter v. Philadelphia National Bank, 290 F. Supp. 234 (E.D. Pa. 1968), rev'd on other grounds, 417 F.2d 21 (3d Cir. 1969); Andrasko v. Chamberlain Mfg. Corp., 608 F.2d 944 (3d Cir. 1979). This per se rule, of course, is predicated

upon the inability of a court to go beyond the scope of the facts, as found by the jury in responding to special verdict interrogatories, so that if the answers are in conflict the court is without the essential factual predicate to support the entry of a verdict. Miller v. Royal Netherlands Steamship Co., 508 F.2d 1103 (5th Cir. 1975); Continental Casualty Co. v. Little, 152 F.2d 728 (5th Cir. 1946).[9/]

9/ F.R.C.P. 49(a), under which authority the special verdict interrogatories were submitted to the jury by the District Court, is silent on the subject of inconsistency in the answers returned by the jury. Rule 49(b), which authorizes the submission of a general verdict accompanied by special interrogatories, does provide some enlightenment concerning the appropriate course to be followed by the court when confronted with inconsistent answers: "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

At the same time, it is incumbent upon the trial court to impose an interpretation upon the jury's answers which will render them internally compatible, if such harmonization can be reasonably accomplished without wreaking havoc to the jury's logical and probable decision on the relevant issues. Griffin v. Matherne, 471 F.2d 911, 915 (5th Cir. 1973) rehearing denied, 474 F.2d 1347 (5th Cir. 1973). The test of whether answers to special verdict interrogatories are inconsistent and irreconcilable is if, upon a fair reading, the acceptance of one answer or set of answers will result in one party prevailing, whereas the acceptance of a different answer or set of answers will cause another party to be favored. See, Special Promotions, Inc. v. Southwest Photos Ltd., 559 F.2d 430, 432 (5th Cir. 1977); Affiliated Capital Corp.

v. City of Houston, 519 F. Supp. 991 (S.D. Tex. 1981).

An application of these principles to the facts of this case shows the critical inquiry to be whether the jury's finding of no liability on the part of Upjohn is irreconcilably inconsistent with the jury's award of compensatory damages to Mt. Airy.

This precise issue has been resolved by the Court of Appeals for the Fifth Circuit with a finding that the jury's answers are, in fact, inconsistent. In Nordmann v. National Hotel Company, 425 F.2d 1103 (5th Cir. 1970), special verdict interrogatories were submitted to the jury, to which the jury initially responded as follows:

1. Was the (defendant)... negligent? NO.

2. If so, was this negligence a proximate cause of the (plaintiffs') injuries...? NO.

3. Was the plaintiff (wife)... guilty of contributory negligence? ... NO.

6. What is the total amount of damages to which the plaintiff (wife) is entitled to recover? $16,000.00

7. Was the plaintiff (husband) gulity of contributory negligence? ... NO.

10. What is the total amount of damage to which the plaintiff (husband) is entitled to recover? $5,000.00.

Id., 425 F.2d at 1106.[10/]

10/ As reported by the trial judge in Nordmann, supra, in answering No. 1, the jury "had just circled 'yes' in pencil, then they had circled 'no' in pencil, and finally in ink, they had written 'no'. Then [for] question No. 2,... [t]hey had apparently circled the word 'yes' in pencil but had left it blank, otherwise, that they had erased the word 'yes.'" The Court of Appeals noted that "as first returned, only three answers had been written in ink, viz., the answers 'no' to questions 1, 3, & 7. No authority is cited, however, which would require or permit the court to ignore the penciled answers." Id., 425 F.2d at 1106.

The Court of Appeals for the Fifth Circuit agreed with the district court's conclusion that the answers to the foregoing interrogatories were inconsistent, thereby requiring their resubmission to the jury. As stated by the Court of Appeals:

> The trial court had instructed the jury that the answer "no" to the first question would end the case, and that questions 3 and 7 should be answered only in the event that both questions 1 and 2 had been answered in the affirmative. The fact that questions 2, 3 and 7 were answered was inconsistent with any negative answer to the first question. The answer "no" to the first question was also inconsistent with the answer to questions 6 and 10, (the damages interrogatories) which in effect constituted a general verdict.

Id., 425 F.2d at 1106 (emphasis added).

The Appeals Court further held that the trial court had acted properly, and within the authority of F.R.C.P. 49, in reissuing the interrogatories to the jury for further consideration. The final answers

of the jury, wherein the jury found the defendant's negligence to have been a proximate cause of the plaintiff's injuries, were upheld as supportive of the District Court's entry of judgment in favor of the plaintiffs.

An inconsistency in the jury's answers to special verdict interrogatories also was found to be present by the Fifth Circuit Court of Appeals in Griffin v. Matherne, 471 F.2d 911 (5th Cir. 1973):

> 6(a). Was (the defendant) National Lead Company negligent? YES.
>
> 7. Was the negligence of (the defendant) National Lead Company a proximate cause of plaintiff's injuries? ... NO.
>
> 14. Was plaintiff... negligent? YES.
>
> 15. Was the negligence of plaintiff a proximate cause of his injuries. YES.
>
> 16. At what percentage do you find that plaintiff was

negligent as compared to the other parties, if any? 20%

17. What is the total dollar amount of damages sustained by plaintiff...? $105,000.00.

Id., 471 F.2d at 913-14.

The Griffin Court concluded that a clear and irreconcilable inconsistency arose between the jury's answers to nos. 6(a), 16, and 17, on the one hand, and the jury's further finding, in response to no. 7, that the negligence of the defendant National Lead Company was not a proximate cause of the plaintiff's injuries:

> [W]e are not able to reconcile the jury's answers insofar as they relate to National Lead. By answer 6a National Lead was found to be at fault.... By number 16 the jury fixed the negligence of the "other parties" as compared to that of plaintiff to be 80% and nothing elsewhere tells us with certainty that National Lead was excluded from the phrase "other parties." Number 17, fixing the damages, and the colloquy of the jury with the court concerning the share to go to the plaintiff's attorney, considered together,

> evidence an intent on the part of the jury that some defendant, one or more was to be liable to plaintiff in dollars and cents....11/
>
> Since only National Lead was found to be guilty of fault... the finger of liability points at National Lead. Yet by answer 7 the jury found National Lead's negligence not a proximate cause of plaintiff's injury. Nothing occurring in the trial, in the court's instructions, or in the arguments made to us on this appeal, enables us to make the jury's inconsistent answers into a consistent expression of intent that National Lead is either liable or excluded from liability.

Id., 471 F.2d at 916.

Both Nordmann, supra, and Griffin, supra, demonstrate that the Fifth Circuit Court of Appeals has adopted a per se rule whereby negative answers to liability in-

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11/ Similarly, the post-trial interview by the District Court of the jury foreman and jurors nos. 3 & 4 in the present case also evinces a clear intent on the part of the entire jury to hold Upjohn liable to Mt. Airy for the stipulated monetary damages.

terrogatories in conjunction with an affirmative award of damages constitute irreconcilably inconsistent answers to special verdict interrogatories, precluding the entry of judgment based upon such answers.

Notwithstanding such precedential authority, the Third Circuit Court of Appeals has held in the instant matter that negative answers to causation interrogatories are not inconsistent with an award of damages, in clear conflict with and contradiction of the decisions of the Fifth Circuit Court of Appeals in Nordmann, supra, and Griffin, supra.

In addition, the decision in the present case is in conflict with another decision of the Court of Appeals for the Third Circuit in Stanton v. Astra Pharmaceutical Products, Inc., 718 F.2d 553 (3d Cir. 1983). In Stanton, supra, the Court of Appeals

held that the jury's answers to special interrogatories "...were inconsistent among themselves and, in some cases, with the damage award itself." Id., 718 F.2d at 577. Because of the irreconcilable inconsistencies in the answers, as initially returned by the jury, the Court of Appeals held that the district court had acted properly in resubmitting the interrogatories to the jury for reconsideration.[12/]

The nature of the inconsistency in the jury's answers in Stanton, supra, is suc-

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12/ While the Court of Appeals expressly affirmed the propriety of the district court's resubmission of the "Special Questions", based upon the inconsistent answers returned by the jury, the Appeals Court also held that the lower court had abused its discretion in ordering a new trial limited to damages (pursuant to a post-trial change in Pennsylvania law regarding calculation of damages) and therefore vacated the judgment and remanded for a new trial on both issues. Id., 718 F.2d at 556.

cinctly summarized by the Court of Appeals as follows:

> "The jury awarded the $315,000 in response to Special Question 26:
>
> 'If you determine that any of the defendants are liable in damages to plaintiff, what compensatory damages do you award?'
>
> A reasonable reading of that question suggests that any award necessarily would depend on a predicate finding of liability; as we already have discussed,... a finding of liability must subsume a finding of proximate cause. But... the jury also found that neither the negligence nor the defective nature of the drug had been a substantial factor in causing the plaintiff's injury, see, Special Questions 9(b), 10(b) and 11(b).... Thus, as the District Judge observed, the jury apparently awarded damages 'against no one.'" Id., 718 F.2d at 572.

The Court of Appeals for the Third Circuit concluded that the jury's answers in Stanton, supra, were irreconcilably inconsistent because "[t]he jury awarded damages by answering a question predicated upon a finding of liability even though

the answers to other questions apparently absolved (the defendant) of liability." Id., 718 F.2d at 577.

Every decision which has addressed the subject of inconsistent answers by a jury to special verdict interrogatories has recognized that, in all instances, the answers must be read in the context of the trial court's instructions to the jury on the applicable law and the circumstances under which some or all of the interrogatories are to be answered. E.g., Halprin v. Mora, 231 F.2d 197 (3d Cir. 1956); Nordmann v. National Hotel Co., supra; Griffin v. Matherne, supra.

The District Court in the action sub judice clearly instructed the jury on numerous occasions that it was not to come to the issue of damages unless it first had found the defendant liable which, in turn,

would consist of finding that the defendant had breached its duty to the plaintiff and, by such breach, had caused the plaintiff's damages. The District Court's verbal instructions then were reiterated and reinforced in a written, covering memorandum to the special verdict interrogatories, which the District Court explained to the jury, and allowed to be taken into the jury room and referred to by the jury in answering the interrogatories.

After receiving the District Court's instructions, the jury answered the interrogatories, finding three separate breaches of duty by the defendant, but also that such breaches had not caused the plaintiff's damages. Impliedly, the jury therefore found the defendant to have been not liable. At the same time, and as was established beyond peradventure by the post-verdict interrogation of three members of the jury,

the jury awarded damages of $973,000.00 to the plaintiff. In view of the District Court's instructions, however, a necessary predicate for the jury's award of damages is a finding that the defendant was liable for such damages.

Consequently, the jury's answers are internally inconsistent and incapable of harmonization, thereby precluding the entry of judgment. The decision of the Court of Appeals for the Third Circuit that the jury's answers were not inconsistent overlooked or misapprehended the Fifth Circuit Court of Appeals' contrary holdings in Nordmann, supra, and Griffin, supra, so that a conflict exists between the Courts of Appeals for the Third and Fifth Circuits on this issue. In addition, the decision of the Third Circuit Court of Appeals in the present matter is in conflict with its decision in Stanton, supra, in which, on

virtually identical facts, the Third Circuit Court of Appeals reached a contrary conclusion. Finally, in entering judgment on the basis of irreconcilably inconsistent answers to the jury, the District Court arrogated to itself the exclusive authority of the jury to reach a verdict, thereby effectively denying Mt. Airy's constitutionally protected right to a trial by jury.

Accordingly, it is necessary for this Court to review the instant matter on writ of certiorari in order to resolve the conflict between the decisions of the Courts of Appeals for the Third Circuit and Fifth Circuit, and to secure Mt. Airy's constitutional right to a trial by jury.

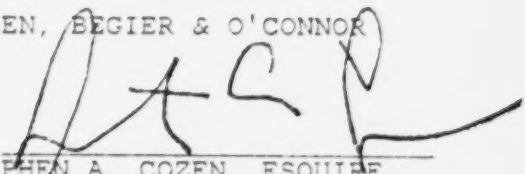
VI. CONCLUSION

Petitioner, Mt. Airy Lodge, Inc., requests this Court to review on Writ of

Certiorari the Judgment Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

COZEN, BEGIER & O'CONNOR



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Petitioner

v.

THE UPJOHN COMPANY,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 82-1810

MOUNT AIRY LODGE, INC.,
Appellant

v.

THE UPJOHN COMPANY

(Civil No. 79-4658 - E.D.Pa.)

District Judge:
Honorable Louis H. Pollak

Argued September 15, 1983
BEFORE: SEITZ, Chief Judge, GIBBONS and ROSENN, Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.
Costs taxed against appellant.

BY THE COURT:

_____
Chief Judge

ATTEST:

_____
SALLY MRVOS, CLERK
DATED: SEP 22, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-1810

MOUNT AIRY LODGE, INC.,
Appellant

v.

THE UPJOHN COMPANY

(Civil No. 79-4659 - E.D.Pa.)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and ROSENN, Circuit Judges,

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

_____
Collins J. Seitz,
Chief Judge

DATED: OCT 17, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mount Airy Lodge, Inc.	:	CIVIL ACTION
	:	
v.	:	
	:	
The Upjohn Co.	:	NO. 79-4658

CIVIL JUDGMENT

Before: Louis Pollak

AND NOW, this 19th day of November, 1982, in accordance with Verdict by the Jury on Interrogatories;

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Defendant Upjohn Co. and against Plaintiff Mount Airy Lodge, Inc.

BY THE COURT:

_____

ATTEST:
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mount Airy Lodge, Inc.	:	CIVIL ACTION
	:	
v.	:	
	:	
The Upjohn Co.	:	NO. 79-4658

ORDER

Upon consideration of plaintiff's motions, in the alternative, to vacate judgment and enter judgment for plaintiff pursuant to verdict, or for judgment notwithstanding the verdict, or for a new trial, and bearing in mind that the numerous contentions advanced by plaintiff in support of these motions are repetitive of contentions ruled upon prior to and during the trial, it is hereby ORDERED that plaintiff's motions are DENIED.

POLLAK, J.

DECEMBER 1, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mount Airy Lodge, Inc.	:	CIVIL ACTION
	:	
v.	:	
	:	
The Upjohn Co.	:	NO. 79-4658

ORDER

For the reasons set forth from the bench on July 14, 1982, it is hereby ORDERED that:

1. Defendant's motion to dismiss with prejudice plaintiff's warranty claims is GRANTED;

2. Defendant's motion to dismiss with prejudice plaintiff's claim for the cost of removing or covering the remaining exposed foam applications on its premises is GRANTED;

3. Defendant's motion to dismiss with prejudice plaintiff's claim for misrepresentation under Section 402B of the Restatement (Second) of Torts is DENIED;

4. Defendant's motion to dismiss with prejudice plaintiff's claim for design defects under Section 402A of the Restatement (Second) of Torts is GRANTED;

5. Defendant's motion to dismiss with prejudice plaintiff's claims for negligent testing is GRANTED in part; plaintiff will be permitted to introduce evidence concerning the testing issue as part of its claim for punitive damages; and

6. Defendant's motion to dismiss with prejudice plaintiff's claim for punitive damages is DENIED.

POLLAK, J.

JULY 15, 1982

October 29, 1982

Memorandum to the Jury

RE: Attached Interrogatories

When you have completed your deliberations, you will record on the attached interrogatories your unanimous answers. Those answers will constitute your decision in this case. When you have finished recording your answers to the interrogatories, you will inform me, via the marshal, that you have reached a verdict. I will then so advise the attorneys. As soon as the attorneys and I are in the courtroom, you will come in, bringing the attached interrogatories, and your answers to the interrogatories will be read out loud.

Interrogatories 1 through 11 ask you to make findings about each of the three separate - alternative - theories of liability (Negligence; Strict Liability; and Misrepresentation) presented by plaintiff in this case. Interrogatories 12 and 13 ask you to make findings about damages. You will not answer the damages interrogatories unless you find the defendant liable to the plaintiff on at least one of the three theories of liability. Specifically, this means that you should answer the damages interrogatories if, but only if:

1) You have answered "NO" to interrogatory 3 or 4; or

2) In answering interrogatory 5 you have attributed to plaintiff an amount of negligence less than 51 per cent; or

3) You have answered "NO" to interrogatory 8; or

4) You have answered "YES" to interrogatory 11.

LOUIS H. POLLAK

INTERROGATORIES

NEGLIGENCE

1. Was the defendant negligent in failing to exercise reasonable care so as to adequately warn the plaintiff, before the date of the fire at Mount Airy Lodge, of the dangers and risks of harm associated with using the defendant's polyurethane foam insulation?

__X__ YES

_____ NO

(If your answer to No. 1 is yes, go on to No. 2).
(If your answer to No. 1 is no, go on to No. 6).

2. Was the defendant's negligence a substantial factor in bring about the property damage and other losses sustained by the plaintiff?

_____ YES

__X__ NO

(If your answer to No. 2 is yes, go on to No. 3).
(If your answer to No. 2 is no, go on to No. 6).

3. Was the plaintiff negligent in subjecting its property to unreasonable and unforeseeable risks of harm in connection with its use of the defendant's polyurethane foam insulation?

_____ YES

_____ NO

(If your answer to No. 3 is yes, go on to No. 4).
(If your answer to No. 3 is no, go on to No. 6).

4. Was the plaintiff's negligence a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(If your answer to No. 4 is yes, go on to No. 5).
(If your answer to No. 4 is no, go on to No. 6).

5. (ANSWER ONLY IF YOUR ANSWERS TO NO. 3 AND NO. 4 ARE "YES").

Taking the combined negligence that was a substantial factor in bringing about the property damage and other losses sustained by the plaintiff as 100 percent, state in percentages the amount of negli-

gence attributable to the plaintiff and to the defendant:

Plaintiff _____ percent

Defendant _____ percent

(Go on to No. 6).

STRICT LIABILITY

6. At the time of sale to the plaintiff, was the defendant's polyurethane foam insulation in a defective condition in failing to be equipped with adequate warnings about the dangers and risks associated with using the defendant's product?

__X__ YES

_____ NO

(If your answer to No. 6 is yes, go on to No. 7).
(If your answer to No. 6 is no, go on to No. 9).

7. Was the defective condition of the defendant's polyurethane foam insulation a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

__X__ NO

(If your answer to No. 7 is yes, go on to No. 8).

(If your answer to No. 7 is no, go on to No. 9).

8. Did the plaintiff actually know and fully appreciate the nature and extent of the dangers associated with the defendant's polyurethane foam insulation and, despite having such an understanding, willingly choose to undertake the risks of using the defendant's product?

_____ YES

_____ NO

(Go on to No. 9).

MISREPRESENTATION

9. Did the defendant make misrepresentations to the public, including the plaintiff, about the character or quality of its polyurethane foam insulation which the average consumer would consider important in deciding whether to buy the defendant's product?

__X__ YES

_____ NO

(If your answer to No. 9 is yes, go to No. 10).

(If your answer to No. 9 is no, go to No. 12).

10. Did the defendant's misrepresentations influence the plaintiff in its decision to buy the defendant's product?

_____ YES

__X__ NO

(If your answer to No. 10 is yes, go to No. 11).

(If your answer to No. 10 is no, go to No. 12).

11. Was the plaintiff's reliance upon the defendant's misrepresentations a substantial factor in bringing about the property damage and other losses sustained by the plaintiff?

_____ YES

_____ NO

(Go on to No. 12).

COMPENSATORY DAMAGES

12. State the amount of the property damage to the plaintiff's laundry building, machinery and equipment, the amount of the plaintiff's losses resulting from the damage to its towels, sheets, bedding and other linens, and the amount of the losses sustained by the plaintiff as a result of the interruption of its business, which were caused by the fire at Mount Airy Lodge.

$973,000

(Go to No. 13).

PUNITIVE DAMAGES

13. (a) Do you find that the plaintiff is entitled to punitive damages?

_____ YES

__X__ NO

(b) If your answer to No. 13(a) is yes, state the amount.

$ -0-

MOUNT AIRY LODGE, INC.

v.

THE UPJOHN COMPANY.

Civ. A. No. 79-4658

UNITED STATES DISTRICT COURT,
E.D. PENNSYLVANIA.

Nov. 19, 1982.
(96 F.R.D. 378)

MEMORANDUM

LOUIS H. POLLAK, District Judge.

On October 28, 1982, after a long trial, I committed this diversity products-liability case to the nine-person jury. I instructed the jury on three theories of liability: negligence, strict liability, and misrepresentation. In addition, I gave the jury thirteen special interrogatories which I explained in my charge and upon which I elaborated in a covering memorandum.

After brief deliberations on October 28, the jury recessed until the following morning. In the course of that day, the jury asked two questions; I responded to them in court with counsel present. In mid-afternoon the jury returned with answers to the special interrogatories. 1/

1/ The covering memorandum, the interrogatories and the jury's written answers to the interrogatories are attached hereto as Appendix A.

The jury's answers found the defendant negligent, found the defendant's product in a defective condition at the time of sale, and found that the defendant had made misrepresentations to the public, including the plaintiff, about the character or quality of its product. 2/ The jury's answers also found, however, that neither the negligence nor the defectiveness was a substantial factor in causing plaintiff's loss, and that the misrepresentations did not influence plaintiff's decision to buy the defendant's product. 3/ Taken together, the last three answers negated liability on all of plaintiff's potential theories of liability. The following colloquy then took place:

> The Court: All right. So you did not go any farther [than interrogatory 10].
>
> Foreman: That's right.
>
> The Court: Is that correct?
>
> Foreman: That's correct.

I then asked each juror whether the answers reported by the foreman were her/his answers. Each juror answered in the affirmative. I thanked the jury members and dismissed them. After the jurors left the courtroom, I stated that judgment would be entered in favor of the defendant.

2/ Interrogatories 1, 6, and 9.

3/ Interrogatories 2, 7 and 10.

Approximately one-half hour later, plaintiff's chief trial counsel -- Messrs. Fetterly and O'Connor -- returned to the courtroom where I was hearing another matter. During a recess, Messrs. Fetterly and O'Connor advised me that a few minutes earlier: (1) two jurors -- jurors 3 and 4 -- had approached Mr. Fetterly outside the courthouse and congratulated him on plaintiff's victory, after which (2) Mr. Fetterly's conversation with the two jurors was enlarged to include Mr. O'Connor in whose presence the two jurors reiterated their understanding that the jury had reached a verdict under which plaintiff was to recover $973,000. 4/

I asked Messrs. Fetterly and O'Connor to advise Mr. Harbaugh, of defense counsel, that a matter had arisen with respect to which I would appreciate his returning to court. Shortly thereafter, a conference was held in chambers: Messrs. Fetterly and O'Connor represented plaintiff and Messrs. Harbaugh, Kittredge and Lewis represented defendant. During that conference, which was on the record, Messrs. Fetterly and O'Connor repeated the substance of their conversations with jurors 3 and 4. Counsel and I also examined the written interroga-

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4/ $973,000 was the figure to which the parties had stipulated as being plaintiff's actual loss if compensatory damages were to be awarded; interrogatory 12 as submitted to the jury contained the figure $973,000 in the blank in which an answer would be inscribed.

tory answers. Notwithstanding that the foreman had in court affirmed that the jury had not gone beyond interrogatory 10, we discovered that interrogatory 13 had been answered. (Interrogatory 13 answered "No" with respect to plaintiff's entitlement to, and "0" with respect to the amount of, punitive damages; interrogatory 10 was the last causation interrogatory.)

Relying on (1) what jurors 3 and 4 said to plaintiff's counsel, and (2) the arguable inaccuracy of the foreman's in-court affirmation that the jury had not proceeded beyond interrogatory 10, plaintiff's counsel asked me to interview the two jurors who had approached Mr. Fetterly and also to reconvene the entire jury panel. Defense counsel objected, citing Federal Rule of Evidence 606(b). I declined to act on either of plaintiff's counsel's requests at that time, asking instead that the parties brief the issues. I then met with the two jurors and cautioned them not to discuss the matter with their fellow jurors or with counsel until they heard further from this court.

Briefs on the plaintiff's motion to recovene the jury were filed on November 3. Reply briefs were filed on November 5. Argument was had on November 10.

Two questions are presented to the court - questions the resolution of which, so plaintiff contends, calls for reassembling and interrogating the jury. The first of the two questions is whether the jury's recorded answers to the special interrogatories are irreconcilably inconsistent. The second is whether one or more of the jury's recorded answers to interroga-

tories, as reported to the court orally and on paper, is/are not the answer(s) actually voted by the jury. If either of the two questions is answered by the court in the affirmative - so plaintiff argues in its most recent submission (letter of November 11, 1982, from Patrick J. O'Connor, Esq.) - the jury should be reinstructed and directed to deliberate further or a new trial should be ordered.

Defendant contends that since the jury has been discharged, any interrogation of a juror now is barred by Rule 606(b). 5/ Defendant further contends that there is an interpretation of the jury's written answers to the interrogatories that is internally consistent. 6/ And defendant submits that

5/ The literature with respect to post-verdict interrogation of jurors is substantial. For recent and thoughtful case discussion of Rule 606(b), see Brewer v. Jeep Corp., 546 F. Supp. 1147 (W.D.Ark. 1982); McNulty v. Borden, 542 F. Supp. 655 (E.D.Pa.), appeal dismissed, No. 82-1457 (3d Cir. Oct. 19, 1982).

6/ Under that interpretation: The jury would be understood (1) to have treated interrogatory 12 -- where it made no notations -- not as an assessment of damages against defendant in the sum of $973,000 but simply as a statement agreed upon by the parties, and to which the jury took no exception, that plaintiff's aggregate loss due to fire was $973,000; and (2) to have answered "No" and "0" to interrogatory 13 as reflecting its recognition that no punitive damages were proper where no liability had been found.

as a matter of law a plausible consistent interpretation must be preferred to any number of equally or even more plausible inconsistent interpretations.

On this last proposition, defendant appears to be right; indeed, the Seventh Amendment is said to compel the rule. Griffin v. Matherne 471, F.2d 911, 915 (5th Cir. 1973). But to attribute consistency to the jury's written answers one must proceed from the assumption that those written answers are the answers the jury voted and directed the foreman to report. That there is a very strong basis for such an assumption is manifest -- namely, that each juror in open court expressed her/his agreement with the answers read by the foreman, which answers negatived liability on each of the three theories propounded. The only factors cutting somewhat against the assumption that the answers were accurately recorded are (1) the hearsay statements of jurors 3 and 4, and (2) the fact that the foreman's written answers include a form of answer (not reported orally by the foreman in open court) to interrogatory 13, although the jury had been instructed in my charge and by the covering memorandum not to proceed to interrogatories 12 and 13 unless it had found liability on at least one of the three proposed theories of liability. 7/

7/ The weight of these instructions is in some measure undercut by the fact that the interrogatory form itself directed the jury, if it answered "No" to interrogatory 10, to go on to interrogatory 12, which in turn directed the jury to interrogatory 13.

Defendant, in addition to being unpersuaded that there is any uncertainty about the accuracy of the recorded interrogatory answers, insists that, even if there be any measurable uncertainty, interrogation of jurors to resolve the matter is foreclosed by Rule 606(b) since such testimony would enter the forbidden area of impeachment of the verdict. But defendant's reading of Rule 606(b) is a shade too broad. The Rule "would not bar testimony by a juror that all the jurors agree that through inadvertence, oversight or mistake the verdict announced was not the verdict on which agreement had been reached." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶606[04] at 606-32 (1981).

Accordingly, I conclude that, in view of the brooding (albeit narrow) uncertainty which I perceive, there is ground for recalling jurors 3 and 4 and the foreman to be interviewed by me. In such interview(s) I will ask one or more of them -- individually and in camera, 8/ but on the record - such questions as will help me determine

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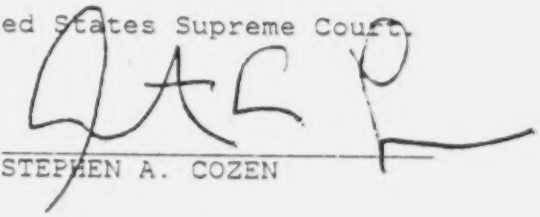
8/ The interviewing will be in chambers. When I have completed such questioning as I think sufficient with respect to a particular juror, the reporter and I will come into the courtroom and the reporter will read the questions and answers to counsel. This will enable counsel to have the opportunity to request that I put additional questions to the interviewee before releasing him. If I decline to pursue such a request, I will so advise counsel on the record at that time.

(1) whether there is prima facie evidence for supposing that all nine of the jurors would, if recalled, agree that there has been a "mistake" in reporting any jury answer, and(2) whether such mistake(s), if found to exist, would undercut the preclusion of liability reflected in the answers reported in court.

CERTIFICATE OF MEMBERSHIP

I, STEPHEN A. COZEN, do hereby certify that I am a member in good standing of the Bar of the United States Supreme Court.



STEPHEN A. COZEN

AFFIDAVIT OF SERVICE

ELLIOTT R. FELDMAN, ESQUIRE, being duly sworn according to law, deposes and says that on January 13, 1984, I served three (3) copies of the foregoing Petition for Writ of Certiorari, and Appendix thereto, on The Upjohn Company, respondent herein, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to Richard P. Brown, Esquire, counsel of record for respondent, at his office address of One Logan Square, Philadelphia, Pennsylvania 19103.

COZEN, BEGIER & O'CONNOR

BY: _____
ELLIOTT R. FELDMAN, ESQUIRE
The Atrium - Third Floor
1900 Market Street
Philadelphia, PA 19103
(215) 665-2071
ATTORNEY FOR PETITIONER

Sworn and subscribed before me this 13th day of January, 1984.

_____
NOTARY PUBLIC

PATRICIA A. DOLAN
Notary Public, Philadelphia, Pa.
My Commission Expires May 24, 1985